INDEX

CITATIONS

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 24, 1956.

OPINIONS BELOW

The opinion of the district court (R. 8-12) is reported at 126 F. Supp. 646. The opinion of the court of appeals (Appendix A, *infra*, pp. 16-25) is reported at 230 F. 2d 690.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*, p. 26) was entered on February 24, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the grant by the United States to respondent in 1862 of "the right of way through the public lands * * * for the construction of said railroad and telegraph line * * *" conveyed the title to oil and gas deposits underlying the right of way so that respondent may remove or dispose of such deposits.

STATUTE INVOLVED

Sections 2 and 3 of the Act of July 1, 1862, 12 Stat. 489, 491-492, read as follows:

> SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

STATEMENT

This action was instituted by the United States to restrain respondent railroad company from conducting drilling operations for the discovery and

removal of oil and gas underlying that portion of its right of way which traverses certain lands in the State of Wyoming, and to quiet title in the United States to such mineral deposits. The facts are not in dispute and were stipulated (R. 5-8).

Pursuant to the general policy of encouraging the construction of railroads, the United States, by the Act of July 1, 1862, 12 Stat. 489, authorized the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Section 2 of the Act (12 Stat. 491-492, *supra*, p. 2) provided that "the right of way through the public lands be, and the same is hereby, granted to [respondent's predecessor in title] for the construction of said railroad and telegraph line." The right of way extended for two hundred feet on each side of the railroad when located. By Section 3 there were also granted in fee five alternate sections per mile within a belt of ten miles on each side of the road (*supra*, p. 3) "for the purpose of aiding in the construction of said railroad and telegraph line," but "all mineral lands" were expressly excepted from the Act. It was further provided as to this latter grant that such so-called "place" lands, if not sold or disposed of by the grantee within three years after completion of the entire road, should be subject to settlement and pre-emption, like other lands, and that the purchase price be paid to the grantee company.[1]

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[1] The 1862 Act was amended by the Act of July 2, 1864, 13 Stat. 356, 358, in respects which do not affect the question

It was stipulated and accordingly found as a fact that respondent and its predecessor have complied in all respects with the requirements of the Act granting the right of way, have built the railroad and telegraph line, and have at all times been using the right of way for the purposes set out in the Act of July 1, 1862, and that no portion of the right of way has been abandoned (Stip., par. 5, R. 5-6; Fdg. 5, R. 13).

It was further stipulated and found that the subject of this litigation is "The nature of the title to and the parties' interest in" that portion of the right of way traversing the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming, and that, other than the right of way, the title to the minerals in the above-described tract is in the United States (Stip., par. 10, R. 7; Fdg. 6, R. 13). It was also found by the District Court that respondent's proposed drilling operations and the removal, use and disposal and subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes (Fdg. 8, R. 13-14).

In addition to its findings of fact, the District Court filed a memorandum opinion (R. 8-12) and conclusions of law (R. 14-15). In summary, the

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here presented. Section 3 was amended to increase the outright grant of sections to ten sections per mile instead of five on each side of the road, and to increase the belt on each side from which those sections could be selected to twenty miles instead of ten. It was further provided that "mineral land," as used in the 1862 Act, "shall not be construed to include coal and iron land."

court held that the railroad acquired a "limited fee" in the right of way, that the United States neither reserved nor excepted oil, gas, and other minerals beneath the right of way, and that the company could use the right of way for any purpose which did not interfere with continued operations of the railroad, and hence could drill for and remove subsurface oil and gas. The Court of Appeals, on substantially the same theory, affirmed.

REASONS FOR GRANTING THE WRIT

1. The opinions of both courts below build upon the same primary foundation for their conclusion that respondent owns the oil and gas underlying the right of way. Both courts rest on a line of decisions of this Court holding, in effect, that grants such as is here involved vested in the grantee railroad company a "base", "qualified", or "limited fee". Applying the technicalities of private real estate law ordinarily applicable to an estate so labeled, the courts below conclude that the only restriction upon the grant is a requirement of continued use for operation of the road, and hence that respondent necessarily owns and can use the underlying minerals.

Seven such decisions are cited by the Court of Appeals (App. A., *infra*, p. 19), of which the leading case is *Northern Pacific Ry* v. *Townsend*, 190 U.S. 267. But in only one of those cases was the United States a party, and in none was any question of title to or use of underlying minerals

in focus.[2] The District Court frankly acknowledged that the issue here "heads into virgin legal territory" and that "there are no cases which form a precedent as being on all fours with the case at bar" (R. 9). Likewise, the Court of Appeals recognizes (App. A, *infra*, p. 21) that in the "limited fee" decisions cited by it "the United States was not a party and the right to minerals underlying rights of way was not being considered."

That court, however, erroneously justifies its reliance on the "limited fee" cases by the decision of this Court in *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262 (App. A, *infra*, pp. 21-23). But *Great Northern*, in which the government prevailed as to a later grant of a right of way, certainly does not warrant the conclusion that "had the court [in the *Great Northern* case] been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals" (App. A, *infra*, p. 23). There, this Court passed upon a grant under the General Right of Way Act of March 3, 1875, 18 Stat. 482, and a major difference between grants authorized by that Act and the earlier land grant statutes was that only a grant of "the right of way" was authorized,

[2] The case of *Clairmont* v. *United States*, 225 U.S. 551, the only case cited in which the Government was a party, involved only the question of whether a specific railroad right of way over lands formerly part of an Indian reservation was "Indian country" within the meaning of federal criminal law relating to introduction of liquor.

there being no grant of "place" lands. In holding that the Great Northern acquired an easement only, the Court relied upon a new policy of giving only rights of way, beginning in 1871 and embodied in general law in the 1875 Act. The Court distinguished and laid aside the "limited fee" cases on the ground that the grants in such cases antedated this new policy. For that reason it did not reach the question of the bearing, if any, of these "limited fee" decisions on the issue of the federal right to minerals—an issue which the Court of Appeals for the Ninth Circuit had held (in its opinion in the *Great Northern* case) was not foreclosed by the "limited fee" cases. *MacDonald* v. *United States*, 119 F.2d 821, 824, affirmed, 315 U.S. 262. That this Court expressly held open this question is put beyond doubt by the statement (315 U.S. at 278) that "none of the ["limited fee"] cases involved the problem of rights to subsurface oil and minerals."

It is plain, therefore, that the issue we present has never been determined by the Court, and that it is now open for authoritative determination.

2. Putting aside the "limited fee" decisions, we believe that the statute cannot properly be construed to grant the underlying oil and gas to respondent.[3] The grant "is to be liberally construed

[3] The Government, in view of the time which has elapsed, does not suggest that the "limited fee" decisions be overruled. But this Court has never stated to what extent the "fee" is limited, and we urge that these decisions be limited to their facts. A construction that the respondent acquired a limited

to carry out its purposes" but "nothing passes but what is conveyed in clear and explicit language." *Great Northern Ry. Co.* v. *United States, supra,* 315 U.S. 262, 272. The purpose of the right of way grant was "for the construction of" a railroad. On no theory can ownership of subsurface oil or gas be regarded as within such purposes, nor does either court below so consider it.[4]

Moreover, the grant is to be construed in the light of the history of the times when it was passed and of the federal policy then in effect. *Great Northern Ry. Co.* v. *United States, supra,* 315 U. S. 262 273. In *Great Northern* this Court based its decision on a change of policy whereby the Government ceased making land grants and substituted grants of a right of way only, rejecting an argument based on the identity of language in the grant of right of way in the 1875 Act and the earlier "limited fee" grants. A still earlier change of federal policy in making grants of all kinds comes into play here. Beginning in 1849, Congress inaugurated a significant policy, at first local to California, of withholding *mineral* lands from disposition under general laws. *Mining Co.* v. *Consolidated Mining Co.,* 102 U.S. 167, 173-174. This policy was extended and between 1864 and 1873 Con-

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fee in the surface and so much of the sub-surface as is necessary "for the construction" of the road would, as we will show, serve every legitimate railroad purpose of respondent and give effect to the intent of Congress to retain mineral wealth in the United States.

[4] There has been no claim here or suggestion by the courts below that extraction of the oil and gas was in any way related to the "construction" of the railroad or even its operation.

gress, by a series of statutes, enacted a "special code" for disposal of mineral lands. *United States* v. *Sweet*, 245 U.S. 563, 571. In the two cases just cited, grants of land to California and Utah which did not in terms reserve mineral lands were nevertheless held not to include them. The same strong policy has continued in effect until the present time.[5]

It is clear that Congress had this policy in mind in 1862, when it made its grants to respondent, and that it intended to withhold any mineral wealth. Section 3 of the Act, as introduced, provided only that "all mineral lands shall be exempted from the operation of this *section*" (emphasis added), but this was broadened by amendment to exclude such lands from the operation *of this Act*. Cong. Globe, 37th Cong., 2d sess., pt. 3, p. 2756. And during debate the Congress was advised that "the mineral lands through which this road is to pass are already excepted in this bill from the lands granted to this company. They will still belong to the Government of the United States." (Cong. Globe, 37th Cong., 2d sess., pt. 2, pp. 1909-1910).[6] This Court has characterized the very mineral exception contained in the Union Pacific grant and others of that period as "expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving

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[5] An extensive discussion of this special minerals policy is contained in *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582 (C.A. D.C.), certiorari denied, 347 U.S. 989.

[6] See also pt. 3, p. 2756, where a similar assurance was again given.

and excluding mineral lands in the absence of an expressed purpose to include them. * * *" *United States* v. *Sweet*, 245 U.S. 563, 569.

Since Congress intended to withhold from the grantee all mineral wealth when it authorized grants of "place" lands in fee, it could not have intended a contrary result as to the right of way, which was granted "for the construction" of the road and in which the respondent was never to acquire the absolute fee. This understanding of the Congressional policy has been recognized in a long-continued and uniform administrative construction that, although a "base" fee was created in the right of way, title to minerals did not pass. The administrative rulings began in 1905, with *Missouri, Kansas and Texas Ry. Co.*, 33 L. D. 470, 471, 472. Also ignored by the court below is the Congressional understanding to the same effect. The Act of May 21, 1930, 46 Stat. 373, authorizing issuance of oil and gas leases, covers railroad rights of way "whether the same be a base fee or mere easement," and thus plainly applies to grants like respondent's.

The sole effort of the Court of Appeals to rebut this position is abortive. In stressing the difference between the Government's retaining of full title to mineral lands and its reserving the mineral rights in lands granted outright (App. A., *infra*, pp. 24-25), the court is in effect saying that minerals are reserved from the right of way grant only when expressly reserved—contrary to the special minerals policy to which we have referred. Secondly,

the circumstance that the railroad could, through ignorance of the true character of the lands, acquire fee title to lands in the "place" area which were actually mineral has no relevance to the right of way, because the right of way, unlike the "place" lands, is never conveyed absolutely. As *Burke* v. *Southern Pacific R. R. Co.*, 234 U.S. 669, cited by the Court of Appeals (App. A, *infra*, p. 25), makes clear, where mineral lands were acquired as "place" lands it was only because they were not known to be mineral at the time of grant, and passed to the railroad as non-mineral or agricultural lands. This does not establish that Congress intended to vest the company with mineral wealth, but merely that overriding considerations of availability and marketability—to permit easy sale in order to provide funds for the construction of the road—required that a conclusive administrative determination of non-mineralty be made as of a specified date. No such situation arises with respect to the right of way which was never to be sold or transferred, and there would therefore be no occasion for a conclusive determination of mineralty. Moreover, lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line. Instead, the exception would be, not the total surface area, but rather, as we urge, the minerals in the land constituting the right of way. As a whole, therefore, the 1862 Act evidences an intent to withhold all mineral wealth, including that in the right of way, and the respondent can

point to nothing in the statute qualifying that purpose.

The Court of Appeals also relied (App. A, *infra*, p. 23) upon *United States* v. *Illinois Cent. R. Co.*, 187 F. 2d 374 (C.A. 7), but that case is plainly different. It involved a grant in 1850, when the fundamental mineral policy was not yet established, and the Illinois Central grant included no express exclusion of mineral lands or minerals such as is here involved, a fact relied upon by the District Court, which wrote the principal opinion in that case, 89 F. Supp., p. 24.

3. This case presents an important issue, upon the determination of which may turn the rights of the United States vis-a-vis not only the Union Pacific but other important railroads which acquired similar contemporary grants of right of way from the Government. The *Great Northern* case, *supra*, presented the question of ownership of oil and gas underlying the right of way grants authorized by the General Right of Way Act of 1875. This case presents the same issue under the earlier type grants of right of way contained in the land-grant acts. Moreover, the grant here involved was the first of a series of such grants occurring in a period which, as we have indicated, marked a new and significant mineral policy.

In Appendix B (*infra*, pp. 26-28) is a tabulation showing the approximate lengths of rights of way constructed by various railroads under numerous grants made during the period beginning with the 1862 grant to the Union Pacific

and ending with the year 1875, when the practice of making land grants was superseded by the General Right of Way Act. This compilation was based upon the best information available and is believed to be substantially accurate.[7] It appears therefrom that about ten thousand miles of railroad right of way were constructed under the instant and other grants made during this period. Certainly, most of the major western railroads were constructed under such grants. For example, the tabulation shows a right of way of 1,038.38 miles constructed by respondent company under the Act here in question (which, on the basis of a 400 foot right of way, is in excess of 50,000 acres), plus numerous connecting lines of substantial lengths constructed under the same act. Additionally, the Atchison, Topeka and Santa Fe constructed 469.35 miles of right of way under a grant contained in the Act of March 3, 1863, 12 Stat. 772, and another stretch of 636 miles under the Act of July 27, 1866, 14 Stat. 292; and the Northern Pacific Railroad (now "Railway") Company, under the Act of July 2, 1864, 13 Stat. 365, and the Joint Resolution of May 31, 1870, 16 Stat. 378, has constructed 2,037.81

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[7] For a tabulation of such grants see also Donaldson, *The Public Domain* (1884), pp. 756-762.

miles of right of way. These examples demonstrate that substantial rights of the Government and of the various major railroads will be affected by decision of the question here presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 1956.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5168—November Term, 1955

Appeal from the United States District Court for the District of Wyoming

(Filed February 24, 1956)

Fred W. Smith (Perry W. Morton, Assistant Attorney General; John F. Raper, Jr., United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for appellant;

William W. Clary, (Loomis, Lazear & Wilson, John U. Loomis; O'Melveny & Myers, Louis W. Myers; Warren M. Christopher and Charles H. McCrea were with him on the brief; Frank E. Barnett, W. R. Rouse, J. H. Anderson, and Henry M. Isaacs, of counsel) for appellee.

Before HUXMAN, MURRAH, and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

The United States brought this action for a determination of its right to oil and gas, or other minerals, underlying a portion of the Union Pacific right of way in Wyoming, and to restrain the Union Pacific Railroad Company from removing oil and gas from such lands. The single question presented is whether the right of way grant in Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491,

conveyed to the predecessor of the Union Pacific such title as to entitle it to develop and take the underlying minerals therefrom.[1] On stipulated facts, the trial court found that the Act granted a fee simple determinable, sometimes called a base, qualified or limited fee title in the right of way, subject only to an implied condition of reverter in the event the company ceased to use the right of way for the purpose of the Act, which title carried with it the right to remove the subsurface oil and gas, and other minerals. 126 F. Supp. 646. A judgment was entered dismissing the action.

The aforementioned Section 2 of the Act of July 1, 1862, reads as follows:

> "Sec. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said com-

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[1] A stipulation of the parties states their claims as follows: "6. Defendant claims that under the Acts of Congress set forth in Paragraph 3 hereof, it received a present grant in fee simple determinable (sometimes called a base, qualified or limited fee) of the lands contained within the right of way and acquired the sole and unrestricted right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals underlying the right of way. Plaintiff claims that the defendant acquired the right to use the right of way only for railroad and telegraph purposes, that defendant acquired no right to use any portion of the right of way to drill for or remove subsurface oil and minerals, that the oil, gas, and mineral deposits underlying the right of way remain the property of the United States and subject to its control and disposition, and that plaintiff is entitled to the relief prayed for. The purpose of this case is to adjudicate those claims and determine the relative rights of the United States and the defendant in the oil, gas, and other minerals underlying the right of way."

pany for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this Act and required for the said right of way and grants hereinafter made."

Section 3 grants to the predecessor of the Union Pacific alternate sections over a limited area along the right of way. It provides that "all mineral lands shall be excepted from the operation of the Act." Section 4 fixes the time when patents shall issue for the alternate sections. It is stipulated that the Act has been complied with and it is not contended that the drilling for oil and gas on the right of way will interfere with the operations of the railroad or the use of the right of way for railroad purposes.

The question of the extent of the estate conveyed in the right of way grants under this Act, and similar Acts during the same period, has been before

the courts on numerous occasions. As to those grants, it has been held without exception that the railroad received more than a mere easement over the land. The substance of the decisions is that considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee with an implied condition of reverter to the United States in the event the company ceased to use or retain the land for the purposes for which it was granted. The most important of these are Railroad Co. v. Baldwin, 103 U.S. 426; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114; New Mexico v. United States Trust Co., 172 U.S. 171; Northern Pacific Ry. v. Townsend, 190 U.S. 267; Clairmont v. United States, 225 U.S. 551; Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190; Missouri, Kansas & Texas Ry. Co. v. Oklahoma, 271 U.S. 303. These cases illustrate that the Supreme Court had a clear understanding of the accepted meaning of the terms "easement", "right of way", "limited fee", and "fee title". The grants considered in the foregoing cases were all made during the period 1850 to 1871. During this period it was considered of utmost national importance that a railroad be constructed to the west coast of the United States and to other areas of the west and northwest. Indeed, the Supreme Court, in referring to the Union Pacific grant, said in United States v. Union Pacific R.R. Co. 91 U.S. 72, 79, that "many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly con-

strued without reference to the circumstances which existed when it was passed."[2] At the time Congress did not consider these grants as bounties or gratuities bestowed upon the railroads but a means of inducing capital to construct railroads, under the most hazardous conditions, for the benefit of the nation. The grants were in the nature of proposals which the company could accept or re-

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[2] These circumstances, the court described in part as follows: "The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. * * * It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. * * *

"Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes." See also United States v. D. & R.G. Ry. Co. 150 U.S. 1; Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618.

ject. Nadeau v. Union Pacific R.R. Co. 253 U.S. 442; Burke v. Southern Pacific R.R. Co. 234 U.S. 669, 679. The inclusion of the right of way grant was an important part of the proposal and the inducement. Railroad v. Baldwin, supra.

To accomplish this national need, Congress adopted a policy of granting a right of way to railroads, and in addition the fee title to large areas of non-mineral lands lying on either side of a right of way. This policy came to an end in 1871.

It is urged that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true, but in the Great Northern Ry. Co. v. United States case, 315 U.S. 262, the United States was a party and the precise question under consideration was the right to the minerals underlying the right of way of Great Northern. The rights in that case were acquired under the general Right of Way Statute. (Act of March 3, 1875, 18 Stat. 482, 43 U.S.C.A. Sec. 934). The court carefully analyzed the "limited fee" cases and the Acts from which they arose, and held that under the 1875 Act, the railroad had only an easement in the right of way grant and was not entitled to the underlying minerals. This result was reached not by overruling, or even criticizing the former cases, but by distinguishing the grants [3] and concluding that the

[3] Section 4 required the location of each right of way to be noted on the land plats in the local land offices and "thereafter all such lands over which such right of way shall pass shall be

1875 Act was "a product of the sharp change in congressional policy with respect to railroad grants after 1871. * * *" The court stated that the former cases construed land grant acts before the shift in congressional policy occurred in 1871, therefore were "not controlling here." The court observed that "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement of the right of way granted in the same act." It is significant that in speaking of Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, which held that a railroad acquiring a right of way under the 1875 Act had a limited fee thereto, the court said:

> "The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in Choctaw, O. & G. R. Co. v.

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disposed of subject to such right of way." The court reasoned that the reserved right to convey the lands subject to the right of way grant was wholly inconsistent with the grant of a fee. There was no such provision in any of the prior acts granting right of way.

> Mackey, 256 U.S. 531, and Noble v. Oklahoma City, 297 U.S. 481, that the 1875 Act conveyed a limited fee are dicta based on the Stringham case, and entitled to no more weight than the statements in that case. * * *"

It appears to us that the language of the Great Northern case is such that no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the "limited fee" cases and held that such title carried with it the right to remove the minerals.

The effect of the Great Northern case was discussed in United States v. Illinois Central R. Co., 89 F. Supp. 17, 23, (affirmed 7 Cir., 187 F. 2d 374). In a well-considered opinion, it was held that "on the authority of the Great Northern case," the Illinois Central, under a grant prior to 1871, acquired a limited fee to the right of way lands which would entitle it to remove the minerals underlying the surface. We think the reasoning of that case is applicable here.[4]

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[4] In speaking of the effect of the Great Northern case, the court said at page 21:

"In the same opinion (the Great Northern opinion) the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, together with the Union Pacific Grant

Generally the terms "limited", "determinable", "qualified", or "base" fee, as applied to the title of real estate, are used synonomyously [sic]. Because of the possibility that it may endure forever, the owner of such an estate, so long as it exists, even though title may revert upon the happening of a condition, has the same rights as an owner in fee simple and may remove underlying minerals. 19 Am. Jur., Estates, Secs. 28, 30, 31; 31 C.J.S., Estates, Secs. 9, 10; Restatement of Property, Sec. 193, Comment (h); United States v. Illinois Central R. Co., supra; Frensley v. White, 208 Okl. 209, 254 P. 2d 982; Davis v. Skipper, 125 Tex. 364, 83 S.W. 2d 318; Johnson Irrigation Co. v. Ivory, 46 Wyo. 221, 24 P. 2d 1053, 126 F. Supp. 646.

The United States urges with special emphasis that the record illustrates that it was the policy of the United States, even during the period prior to 1871, to reserve the minerals in lands conveyed. We cannot accede to the correctness of this proposition. It assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving the mineral

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of July 1, 1862, Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July 2, 1864, Chap. 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."

(P. 23) "On authority of the Northern Pacific case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted. . . ."

rights. The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals. Clearly the Act of July 2, 1862 excludes mineral lands from the grant. As stated in Burke v. Southern Pacific R.R. Co., 234 U.S. 669, this "was not a mere reservation of minerals, but an exclusion of mineral lands." See also Terry v. Midwest Refining Co., 10 Cir., 64 F. 2d 428, 434. The railroad company could not obtain any title to the mineral lands, if known at the time patent issued, but if, after title passed, it developed that the lands were mineral, the United States had no claim. The passing of title by patent or grant was a determination of the non-mineral character of the land. Burke v. Southern Pacific R. R. Co., supra; Barden v. Northern Pacific R. R. Co. 154 U.S. 288. The exclusion of mineral lands was not confined to the railroad grants but to the homestead and other laws permitting the acquisition of public lands. Burke v. Southern Pacific R. R. Co., supra. The policy of conveying the fee and reserving minerals to the United States was not fully developed until the passage of the Stockraising Homestead Law in 1916, 43 U.S.C.A. 291, et seq., and the Leasing Act of 1920, 30 U.S.C.A. 181 et seq. We conclude that the Union Pacific, by the terms of the grant, received a limited fee title to its right of way and is entitled to remove the underground minerals.

Affirmed.

JUDGMENT

Sixty-fifth Day, November Term, Friday, February 24th, 1956.

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX B

The following is a tabulation of the miles of railroad constructed along rights of way granted by right of way provisions included in acts of Congress making grants of land in aid of railroad construction. The tabulation starts with the Act of July 1, 1862, as amended by the Act of July 2, 1864.

Acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356)	
Union Pacific Railroad Company	1038.68 miles
From the Missouri River at Omaha, Nebr., to a junction with the Central Pacific Railroad in the NW-NE¼ sec. 1-T. 6 N., R. 2 W., Utah, 5.11 miles north of Ogden.	
Denver Pacific Railway Co	106.00 miles
From Denver, Colorado, to junction with Union Pacific Ry. Co., at Cheyenne, Wyoming.	
Kansas Pacific Railway Co	638.6 miles
From Missouri State line, near Kansas City to Denver, Colorado.	
Western Pacific Railroad Co	123.16 miles
From Sacramento to San Jose, California.	
Central Pacific Railroad Co	737.5 miles

From Sacramento, Cal., to junction with Union Pacific Ry. Co. in Sec. T. 6 N., R. 2 W., near Ogden, Utah.
Hannibal & St. Joseph R.R. Co. ..... 100.00 miles.
From Atchison, Kansas to 100th mile-post near Waterville, Kansas.
Union Pacific R.R. Co. ..... 101.77 miles
From Sioux City, Iowa, to Fremont, Nebr.
Burlington & Missouri R.R. Co. ..... 190.75 miles
From Plattsmouth to Kearny Junction, Nebr.

Act of March 3, 1863 (12 Stat. 772)

Leavenworth, Lawrence and Galveston R.R. Co. ..... 142.80 miles
From Lawrence, Kansas, to the southern boundary of Kansas.
Atchison, Topeka and Santa Fe R.R. Co. ..... 469.35 miles
From Atchison, Kansas, to western boundary of State near town of Coolidge.
Missouri, Kansas and Texas Ry. Co. ..... 180.50 miles
From Fort Riley to southern boundary of Kansas.

Act of July 1, 1864 (13 Stat. 339) and Act of July 26, 1866 (14 Stat. 289), and Act of July 25, 1866 (14 Stat. 236)

Missouri, Kansas and Texas Rwy. Co. ..... 155.35 miles
From southern boundary of Kansas through the Indian Territory to the Red River near Preston, Texas.

Act of May 5, 1864 (13 Stat. 66)

Wisconsin Railroad Co. ..... 257.00 miles
From Portage via Stevens' Point to Ashland, Wisconsin.

Act of May 12, 1864 (13 Stat. 72)

Sioux City and Saint Paul R.R. Co. ..... 56.25 miles
From the Minnesota boundary to a connection with Iowa Falls and Sioux City Ry. (Illinois Central).

Act of May 12, 1864 (13 Stat. 72)

Chicago, Milwaukee and Saint Paul Ry. Co. ..... 251.00 miles
From South McGregor, via Calmar to a connection with the Sioux City and Saint Paul R.R. at Sheldon, Obrien County, Iowa.

Act of July 2, 1864 (13 Stat. 365), and Joint Resolution of May 31, 1870 (16 Stat. 378)

Northern Pacific Railroad (now Railway) Company .. 2037.81 miles

Act of July 4, 1866 (14 Stat. 87)

Southern Minnesota Railroad Company ..... 279.37 miles
From Houston to Winnebago City to Airlie on western boundary of Minnesota. Owned and operated by Chicago, Milwaukee and Saint Paul Ry. Co.
Hastings and Dakota R.R. Co. ..... 202.10 miles
From Hastings to Ortonville on western boundary of State. Now Chicago, Milwaukee and Saint Paul Ry. Co.

Act of July 23, 1866 (14 Stat. 210)

Saint Joseph and Denver R.R. Co. ..... 226.00 miles
From Elwood, Kansas to junction with Burlington and Missouri River R.R. at Hastings, Nebr., owned and operated by Saint Joseph and Grand Island R.R. Co.

Act of July 25, 1866 (14 Stat. 239)	
California and Oregon R.R. Co.	304.00 miles
From junction with Central Pacific R.R. at Roseville, Calif., to junction with Oregon and California R.R. at Oregon State line.	
Oregon and California R.R. Co.	360.00 miles
From Portland, Oregon to junction with Calif. & Oregon R.R. at California State line.	
Act of July 27, 1866 (14 Stat. 292)	
Saint Louis and San Francisco R.R. Co.	89.00 miles
From Springfield, Missouri to Missouri State line (westwardly).	
Santa Pacific Railroad Co., operated by Atchison, Topeka and Santa Fe Ry. Co.	636.00 miles
From Isleta, N. Mex., to Colorado River.	
Southern Pacific Railroad Co.	495.52 miles
From San Jose, California to Needles on Colorado River.	
Act of May 4, 1870 (16 Stat. 94)	
Oregon and California R.R. Co.	47.50 miles
From Portland, Oregon, via Forest Grove to McMinnville, Oregon.	
Act of March 3, 1871 (16 Stat. 573)	
Southern Pacific R.R. Co.	346.97 miles
From Mojave, Cal. via Los Angeles to Colorado River at Yuma.	
Act of March 3, 1871 (16 Stat. 573)	
New Orleans Pacific R.R. Co.	260.00 miles
From White Castle to Shreveport, Louisiana.	
Total	9832.98 miles